

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

IN RE:

SERVICE ONE LLC

Debtor

Case No. 22-40503
Chapter 11

**TRUSTEE'S MOTION FOR AUTHORITY TO
REJECT UNEXPIRED REAL PROPERTY LEASE**

YOUR RIGHTS MAY BE AFFECTED BY THE RELIEF SOUGHT IN THIS PLEADING. YOU SHOULD READ THIS PLEADING CAREFULLY AND DISCUSS IT WITH YOUR ATTORNEY, IF YOU HAVE ONE IN THIS BANKRUPTCY CASE. IF YOU OPPOSE THE RELIEF SOUGHT BY THIS PLEADING, YOU MUST FILE A WRITTEN OBJECTION, EXPLAINING THE FACTUAL AND/OR LEGAL BASIS FOR OPPOSING THE RELIEF.

NO HEARING WILL BE CONDUCTED ON THIS MOTION UNLESS A WRITTEN OBJECTION IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AND SERVED UPON THE PARTY FILING THIS PLEADING WITHIN TWENTY-ONE (21) DAYS FROM THE DATE OF SERVICE SHOWN IN THE CERTIFICATE OF SERVICE UNLESS THE COURT SHORTENS OR EXTENDS THE TIME FOR FILING SUCH OBJECTION. IF NO OBJECTION IS TIMELY SERVED AND FILED, THIS PLEADING SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT. IF AN OBJECTION IS FILED AND SERVED IN A TIMELY MANNER, THE COURT WILL THEREAFTER SET A HEARING WITH APPROPRIATE NOTICE. IF YOU FAIL TO APPEAR AT THE HEARING, YOUR OBJECTION MAY BE STRICKEN. THE COURT RESERVES THE RIGHT TO SET A HEARING ON ANY MATTER.

COMES NOW Mark A. Weisbart, the Subchapter V Trustee of Service One, LLC (the “Trustee”) files this Motion for Authority to Reject Unexpired Real Property Lease (the “Motion”), pursuant to sections 105(a) and 365 and 554 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et. seq.* (the “Bankruptcy Code”) and Rules 6006(d) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), seeking entry of an order (i) authorizing the Debtor to reject the Lease (as defined below) effective of as April 29, 2022, or the date of filing of this Motion and (ii) granting certain related relief. In support of relief requested, the Debtor respectfully represents the following:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this bankruptcy case and the subject matter of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter involves the rejection of an executory

contract pursuant to 11 U.S.C. § 365; thus, it constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

2. Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief requested in the Motion are Bankruptcy Code Sections 105(a) and 365 and Bankruptcy Rule 6006(d).

II. PROCEDURAL AND FACTUAL BACKGROUND

4. On April 21, 2022 (the “Petition Date”), Service One, LLC (the “Debtor”) filed a voluntary petition under chapter 11 of the Bankruptcy Code. The Debtor’s corporate headquarters is located at 4801 Keller Springs Road, Addison, Texas 75001. As reflected on the Petition, the Debtor chose to proceed under Subchapter V of Chapter 11 in accordance with section 1182 of the Bankruptcy Code (the “SubV Designation”). Thereafter, Mark A. Weisbart was appointed the Subchapter V Trustee for this case pursuant to section 1183 of the Bankruptcy Code.

5. As disputes existed between the Debtor’s two members, Sandra Perry (“Perry”) and Charles Tomasello (“Tomasello,” and with Perry, the “Members”) each of whom own a 50% membership interest in the Debtor, the Debtor on April 25, 2022, filed its *Motion to Remove the Debtor from Possession and Authorize Subchapter V Trustee to Operate the Business of the Debtor* (“Removal Motion”) seeking to be removed as a debtor-in-possession pursuant to section 1185 of the Bankruptcy Code and requested that the Trustee be authorized to manage and operate the Debtor’s business pursuant to section 1183(b)(5).

6. By order entered on April 28, 2022, the Court approved the Removal Motion and vested the Trustee with authority to manage and operate the Debtor’s business.

7. The Debtor operates a construction business which acts as a general contractor in the renovation of residential properties, new home construction, roofing and the restoration of

rental properties.

8. As of the Petition Date, the Debtor, as tenant, leased 1,065 square feet of space located at 4839A Keller Springs, Addison, TX 75001 (the “Space”) as assignee of a certain Office>Showroom/Warehouse Lease Agreement entered by and between Addison-Keller Springs, Ltd., as landlord, and Fab Maid Clean, LLC, as tenant, dated December 14, 2020 (the “Initial Lease”) as extended and assigned to the Debtor through an Addendum to the Lease Agreement between Addison-Keller Springs, landlord, and Fab Maid Clean, LLC, tenant and Service One, LLC, as assuming tenant, executed on November 22, 2021 (the “Addendum,” and with the Initial Lease hereinafter referred to as, the “Lease”). The Lease expires on December 31, 2022. Under the Lease the Debtor pays monthly basic rent of \$843.00 plus an electric charge of \$150.00 and an estimated CAM charge which, as of execution of the Addendum, was \$293.00 (collectively, the “Lease Costs”).

9. Currently, the Debtor is not utilizing the Space in its business other than as a storage space for a few pieces of office furniture. Moreover, the Space is not necessary for the continued or future business operations or for an effective reorganization of the Debtor.

10. Upon information and belief, the Landlord has a party interested in the Space and would, upon the Lease’s rejection, re-lease the Space.

11. Accordingly it is the Trustee’s sound business judgment that the Lease constitutes a significant burden and hindrance to the reorganization effort for the Debtor and that rejection of the Lease would substantially benefit the bankruptcy estate and his creditors.

III. RELIEF REQUESTED

12. By this Motion, the Trustee requests entry of an order, substantially in the form of the Proposed Order, authorizing and approving the rejection of the Lease effective as of April 29,

2022, or the date of filing of this Motion, pursuant to sections 105(a) and 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006(d). Trustee, in an exercise of his sound business judgment, has determined that rejection of the Lease will enhance efforts to successfully reorganize the Debtor's financial affairs, reduce the Debtor's liabilities, provide greater recovery to creditors and for it to exit bankruptcy on a more stable financial foundation. Given these benefits the Trustee believes that rejection of the Lease is in the best interests of Debtor's bankruptcy estate, its creditors, and other parties-in-interest.

IV. ARGUMENT AND AUTHORITY

A. Rejection of the Lease is an Exercise of the Trustee's Sound Business Judgment

13. A trustee, "subject to the court's approval, may assume or reject any executory contract or unexpired lease[.]" See, 11 U.S.C. § 365(a).

14. Ultimately, the question of whether to assume or reject an unexpired lease is based on whether the lease benefits the bankruptcy estate.¹ A trustee's decision to reject an unexpired executory contract or lease is governed by the deferential "business judgment" standard.² Under

¹ *Mission Product*, 587 U.S. ___, 139 S.Ct. at 1658 ("Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties.

² *Id.* ("The bankruptcy court will generally approve [debtor's] choice, under the deferential 'business judgment' rule"); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (stating that the traditional standard applied by courts to authorize the rejection of an executory contract is that of "business judgment"); *Stewart Title Guaranty Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (citing *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994)) ("[Section 365(a)] allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed."); *In re Pilgrim's Pride Corp.*, 403 B.R. 413, 422 (Bankr.N.D. Tex. 2009) ("The general rule is that the decision to reject a given contract should be left to the trustee's (or debtor in possession's) sound business judgment.") (internal citations omitted); *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046–47 (4th Cir. 1985) (a debtor's decision to reject an executory contract can only be overturned if it "is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice").

the business judgment standard, courts “should defer to . . . decisions of corporate directors upon matters entrusted to its business judgment except upon a finding of bad faith or gross abuse of its ‘business discretion.’”³ Further, “[s]ection 365 enables the trustee to maximize the value of the debtor’s estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting those that do not.”⁴

15. Where the trustee’s business judgment has been reasonably exercised, the court should approve the rejection of the Lease. Courts do not generally look beyond the “business judgment” standard because “[m]ore exacting scrutiny would slow the administration of the debtor’s estate and increase its cost, interfere with the Bankruptcy Code’s provision for private control of the administration of the estate, and threaten the court’s ability to control a case impartially.”⁵

16. Here, the Trustee’s decision to reject the Lease is an appropriate exercise of his business judgment as rejection will significantly reduce the financial burdens on the Debtor’s bankruptcy estate. First, the Space is not used in nor is it integral to the Debtor’s current or continuing business operations it provides no benefit to the estate. Thus, it makes sense for the Debtor’s estate to incur and pay the Lease Costs when the Lease provides the estate no value in return. Second, the Trustee does not believe the Lease has any marketable value that could be

³ *Lubrizol*, 756 F.2d at 1047. The “business judgment” test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor’s estate. See *N.L.R.B. v. Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982) (noting that the “usual test for rejection of an executory contract is simply whether rejection would benefit the estate”), *aff’d*, 465 U.S. 513.

⁴ *L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (In re Rickel Home Ctrs., Inc.)*, 209 F.3d 291, 298 (3d Cir. 2000); see also *Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (section 365 of the Bankruptcy Code “allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed”).

⁵ *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

generated through assumption and assignment. Accordingly, the Debtor's estate's continued performance under the Lease would constitute an unnecessary depletion of value of the Debtor's estate.

17. Trustee, having evaluated the Lease and weighing the costs and benefits of the obligations of same, has concluded that it's in the best interest of the Debtor's bankruptcy estate and an exercise of his business judgment to reject the Lease. Accordingly, the Trustee's request seeking rejection of the Lease should be approved.

B. Rejection of the Lese Nunc Pro Tunc to the April 29, 2022, or the Date of Filing of this Motion

18. The Trustee further requests that the Court order the rejection of the Lease *nunc pro tunc* effective as of April 29, 2022, or the date of the filing of this Motion.

19. While section 365 of the Bankruptcy Code does not specifically address the issue, courts have held that bankruptcy courts may, based on the equities of the circumstances, authorize rejection retroactive to a date prior to entry of the order authorizing such rejection.⁶ The balancing of equities favors the relief requested herein.

⁶ See, e.g., *In re Amber's Store, Inc.*, 193 B.R. 819,826-27 (Bankr. N.D. Tex. 1996) ("nothing precludes a bankruptcy court, based on the equities of the case, from approving the . . . rejection of a non-residential real property lease retroactively to an earlier date"); *In re Cafeteria Operators, L.P.*, 299 B.R. 384 (Bankr. N.D. Tex. 2003) (approving retroactive rejection to the later of the date the motion to reject was filed or the date that the leased spaces were vacated); *In re At Home Corp.*, 392 F.3d 1064, 1065 (9th Cir. 2004), cert. denied 546 U.S. 814 (2005) ("the retroactive date may be earlier than the date on which the landlord retakes possession of the premises"); *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (after balancing the equities, a bankruptcy court may approve a rejection retroactive to the date the motion is filed); *In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (rejection has been allowed nunc pro tunc to the date of the motion or the date the premises were surrendered); *Thinking Machines Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995) (noting that "[i]n the section 365 context, this means that bankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation"); *Constant Ltd. Partnership v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 37-38 (S.D.N.Y. 1995) (affirming bankruptcy court's retroactive approval of lease rejection); *Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC)*, 297 B.R. 133, 140 (D. Col. 2003) (holding that a bankruptcy court "has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject").

20. Here, the balance of the equities favors rejection *nunc pro tunc* to April 29, 2022, or the date of filing of this Motion. As set forth above, the Lease provides no benefit to the bankruptcy estate, but rather imposes a financial burden. Absent retroactive rejection, the bankruptcy estate could be forced to incur unnecessary administrative charges and obligations under the Lease without obtaining any corresponding tangible benefit. By email on April 29, 2022, the Trustee communicated to Landlord his intention to reject the Lease. The Debtor will not derive any benefit from the Lease after such notification. Accordingly, the Trustee respectfully submits that it is fair and equitable for the Court to hold that the Lease is rejected *nunc pro tunc* to April 29, 2022, or the date this Motion was filed.

V. RULE 6006(d) WAIVER

21. In addition to the relief requested and described above, the Trustee respectfully requests that any order approving this Motion be effective immediately, thereby waiving the fourteen-day stay period imposed by FED.R.BANKR.P. 6006(d).

VI. PRAYER

WHEREFORE, Mark A. Weisbart, the Subchapter V Trustee of Service One, LLC, respectfully requests that the Court enter an order (i) granting the Motion; (ii) authorizing him to reject the Lease pursuant to Section 365(a) of the Bankruptcy Code; and (iii) granting him such other and further relief to which he may be justly entitled.

Respectfully submitted,

/s/ James S. Brouner

Mark A. Weisbart

Texas Bar No. 21102650

James S. Brouner

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COUNSEL FOR SUBCHAPTER V TRUSTEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was served on the attached mailing matrix, as well as to the below parties, either through the Court's electronic notification system as permitted by Appendix 5005 III. E. to the Local Rules of the U.S. Bankruptcy Court for the Eastern District of Texas, or by first class United States Mail, postage prepaid on this the 2nd day of May 2022.

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Dryden Company
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Addison, Texas 75001

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Fab Maid Clean, LLC
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/s/ James S. Brouner
James S. Brouner

Label Matrix for local noticing

0540-4

Case 22-40503

Eastern District of Texas

Sherman

Mon May 2 13:55:28 CDT 2022

7 Sky Roofing

Attn: Brendan O'Connor

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Plano, TX 75024-3013

22 Rose Street LLC
4901 Keller Springs Road, #105
Addison, TX 75001-6238

7 Sky Roofing
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WEX Fleet Universal
PO Box 4337
Carol Stream, IL 60197-4337

Waterfall Bath Enclosures
1312 W. Crosby Rd.
Carrollton, TX 75006-6908

White's & Sons
DBA All Pro Pest Control Services
2533 Franklin Drive, Suite 2B
Mesquite, TX 75150-6310

William Adams
1002 East Business 380
Decatur, TX 76234-3152

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

BlueVine Capital Inc.
401 Warren Street
Redwood City, CA 94063

City of Dallas
City Hall 2D, South
Dallas, TX 75277

Dell Financial
One Dell Way
Round Rock, TX 78682

TXU Energy
PO Box 650638
Dallas, TX 75265

The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

(d)ADR Plumbing Co.
Attn: Paul Brake
3324 Welch Lane
Sachse, TX 75048-3187

(d)Arbor Contract Carpet, Inc.
PO Box 675096
Dallas, TX 75267-5096

(d)Creations Granite & Marble
1726 Oldfield Dr.
Dallas, TX 75217-1433

(d) Ferguson
PO Box 847411
Dallas, TX 75284-7411

(d) Fix It Right Plumbing
PO Box 1201
Burleson, TX 76097-1201

(d) Glass FX, LLC
1671 Riverview Dr.
Colony, TX 75056-4813

(d) Hernandez Multi Contracting LLC
4801 Keller Springs Rd.
Addison, TX 75001-5912

(d) Home Depot Credit Services
PO Box 790340
St. Louis, MO 63179-0340

(d) Jesus Contreras
900 Via Balboa
Mesquite, TX 75150-3014

(d) Jose Portillo
2901 Runnels St.
Fort Worth, TX 76106-7459

(d) M S International, Inc.
12845 Valley Branch Lane
Farmers Branch, TX 75234-5813

(d) MFS Supply
31100 Solon Road, Suite 16
Solon, OH 44139-3463

(d) Morosco Supply
PO Box 841183
Dallas, TX 75284-1183

(u) Sandra Perry

(d) Sherwin Williams (6288-6)
909 Gross Road
Mesquite, TX 75149-2100

(d) Sherwin Williams (7487-2)
909 Gross Road
Mesquite, TX 75149-2100

(d) Star Window Coverings LLC
2030 East Arbrook Blvd., Ste. 180
Arlington, TX 76014-3798

(d) Trash Chomper LLC
4801 Keller Springs Road
Addison, TX 75001-5912

End of Label Matrix
Mailable recipients 132
Bypassed recipients 18
Total 150